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No. 16

In the Supreme Court of the United States

OCTOBER TERM, 1957

ANDREW G. NELSON, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINION BELOW

The opinion of the district court (R. 276–289) is reported at 150 F. Supp. 181. The report of the Interstate Commerce Commission (R. 234–246) is reported in 63 M. C. C. 407.

JURISDICTION

The final judgment of the district court was entered on June 13, 1956 (R. 290). Notice of appeal was filed on July 2, 1956 (R. 291–294). The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101 (b). Probable jurisdiction was noted on November 13, 1956.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and the Administrative Procedure Act are set forth in the Appendix, *infra*, pp. 33–37.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission might reasonably construe a permit which it issued authorizing the hauling of "stock in trade of drug stores" as not covering the hauling of dried glue for manufacturers of gummed products, automobile batteries for department stores, and other commodities which were not and were never intended to become the stock in trade of any drug store.

2. Whether, in order to construe the phrase "stock in trade of drug stores" appearing in a "grandfather" permit issued in 1942, the Commission must consider evidence which was unknown to the Commission at that time indicating that appellant's predecessor may also have hauled flagstone, bricks, steel bodies and other items.

3. Whether the Commission's report and order are supported by adequate findings and substantial evidence, and whether the Commission's action in entering the cease and desist order was arbitrary or capricious.

STATEMENT

Following the enactment of the Motor Carrier Act of 1935 (Appendix, *infra* pp. 33–36) appellant's predecessor in interest, one Andrew G. Nelson, doing business as Nelson Warehouse & Express Co., applied for a permit under the "grandfather" clause in the first

proviso to Section 209 (a) (1) of the Interstate Commerce Act, as amended. The signed statement submitted by Nelson in support of his application described his business as follows:

> That he is an interstate contract carrier of property for the Walgreen Company and for it alone. That he hauls to and from Walgreen Retail Stores located within 600 miles of Chicago. That said transportation has to do with the opening, the remodeling, and/or the closing of Walgreen retail stores, the commodities so transported are usually store fixtures and equipment and merchandise for the opening stock. [R. 217–220.]

The statement was accompanied by delivery receipts showing interstate contract movements for Walgreen Company in the period from June 27, 1934, to September 21, 1935. No receipts indicating any other carriage were submitted. Appellant recognizes (Br. 10–12) that all of the documents submitted in connection with the application "confirm the impression that Nelson was hauling only for Walgreen" (Br. 11).

As was the practice, no hearing was held on the "grandfather" application, the Commission relying instead on the statements of the applicant himself. The entire record in the "grandfather" application, docket No. MC–1194 of Andrew G. Nelson, was incorporated into the record in the investigation proceed-

ing here under review,[1] and is included in the record before this Court.

On March 13, 1942, the permit was issued. It authorized Nelson to engage as a contract carrier in the transportation of (R. 16):

> *New and used store fixtures, new and used household goods,* and *stock* in trade of drug stores, over irregular routes,
>
> Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.[2]

---

[1] In note 10 on page 11 of its brief the appellant states that despite repeated demands the Commission has refused to make available to appellant's counsel a report made by Mr. Petritz (former District Supervisor of the Commission), concerning the "grandfather" application said to be contained in a "confidential" file. The "confidential" portion of this so-called "report," a copy of which has been furnished appellant's counsel, reads in full as follows:

> 13. A protest to the granting of a Permit to applicant has been filed by the Chicago Rock Island & Pacific and two other western railroads, stating that applicant had not been licensed or permitted in Missouri. Applicant stated that the Walgreen Company operated only in two cities in Missouri—St. Louis and Webster City; that he did not average more than one trip per month into Missouri and that in this, and certain other States, he did not feel it necessary to secure State permission because of the nature of his transportation and the infrequency of his trips.
>
> 14. It is my belief that the operation of Andrew G. Nelson is one of contract carriage and I recommend that a Permit be granted to him to operate over irregular routes in the States of Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio and Wisconsin in order to service present and future Walgreen Company retail stores as he has for the past seventeen years.

Paragraphs 1 to 12 of this "report" already appear in the record (R. 217-220).

[2] The portions of the permit appearing in italics were under-

The critical language here involved is "stock in trade of drug stores". In 1951, Andrew G. Nelson incorporated his business, and the Commission issued a new permit to the corporation embracing the same operating rights as those granted its predecessor and using the same language (R. 26).

In 1954, the Commission, acting upon information received, instituted an investigation to ascertain whether or not the appellant "is and has been engaged in the transportation of commodities not within the scope of its operating authority" (R. 17–19).

Hearing was held before an examiner at which time evidence was adduced establishing that the appellant had, during 1953, transported the following commodities in truck load lots to the consignees indicated. (See appellant's brief, page 7.)

Commodities	*Business of Consignees*
canned or packaged grocery items	grocery stores or warehouses
dry and liquid cream and fruit juices	food manufacturers
beer and wines	liquor distributors
dry glue	manufacturers of gummed products
candy	wholesale candy distributor
dry milk	dry milk distributor
malted milk powder, milk food, drugs and medicine	manufacturers of drugs and dietetic foods
automobile batteries	department stores
fibreboard boxes	dairy
kitchen, storage or wardrobe cabinets or lockers	not indicated in record

scored in the original permit. Neither party appears to attach significance to that fact. In quoting the phrase "stock in trade of drug stores" in this brief we omit, for ease in reading, underlining or italicizing the word "stock".

Upon completion of the administrative proceeding, the Commission issued its report (R. 19–31). The Commission said: "The sole issue herein is thus explicit and requires a determination of the extent of the authority granted by the commodity description '*stock* in trade of drug stores'" (R. 27).

The Commission found that the term includes those commodities delivered to a drug store or which are earmarked for eventual delivery to and sale in a drug store. The Commission further found that the appellant was not authorized to transport the commodities described above; and ordered it to cease and desist from engaging in such transportation in the future (R. 31–32). Upon review of the proceeding, the three-judge district court (one judge dissenting) upheld the Commission's findings and order (R. 276–284, 290).

SUMMARY OF ARGUMENT

I

This is a proceeding requiring appellant to limit its motor carrier operations to those authorized by its permit. The only issue is one of construing the permit that was issued to its predecessor, Nelson, in 1942. Based on the application and statements of Nelson as to his "grandfather", *i. e.*, pre-1935, operations, the permit authorized Nelson to haul "stock in trade of drug stores". The Interstate Commerce Commission has construed that permit as *not* allowing appellant to transport such commodities as dried glue for a manufacturer of gummed products and automobile batteries for department stores.

A. Construing the scope of an existing permit does not constitute a modification or a revocation of a permit. The statutory procedures for revoking a permit are not applicable. The order of the Commission took no rights from appellant. The order merely interprets what rights appellant and its predecessor have had from the beginning.

B. The Commission properly refused to consider evidence concerning the operations of appellant's predecessor during the "grandfather" period. First, appellant itself, in this proceeding, objected to the consideration of such evidence, contending that the permit must be construed on its face. Appellant cannot now argue that it was error for the Commission to follow the view it urged. Second, actual operations of Nelson, unknown to the Commission until this proceeding, could have no bearing on the construction of the 1942 permit. It might become necessary or desirable to consider the statements made to the Commission and on which it relied in issuing the permit. But operations of appellant's predecessor, which were not known to the Commission at the time it issued the permit, could not possibly shed light on the meaning of the language used by the Commission in the permit.

II

The Commission's interpretation of the phrase "stock in trade of drug stores" is reasonable and must be sustained.

A. The Commission has construed the language consistently with its plain meaning. The language used in the permit appears unambiguous. If "stock in

trade of drug stores" means what it says, appellant's permit authorizes it to transport those items which are in fact the stock in trade of an enterprise which is a drug store. The language on its face lends no support to appellant's position that it may transport anything to anybody so long as an item similar to that transported might be sold in a drug store.

B. Only where there is ambiguity should the Commission refer to the record upon which the permit was based. But if the phrase here be deemed ambiguous, the record makes clear that the Commission's construction is correct. Appellant itself recognizes that the application and the other documents submitted at that time convey the impression that the only hauling which Nelson was engaged in was for the Walgreen chain of drug stores. The record upon which the Commission acted in issuing the 1942 permit was a record indicating that the only merchandise being hauled was that which was intended to be used by drug stores as their stock in trade. In the light of the record upon which the permit was issued, it is inconceivable that the Commission intended to authorize Nelson to engage in the general hauling of all goods similar to those dealt in by drug stores.

C. The Commission's construction of the permit is consistent with prior decisions in other cases. Since the beginning of motor carrier regulation the Commission, as one means of describing commodities in permits and certificates, has identified them by reference to the intended future use. Similar permits have been construed in other cases in the same way as appellant's permit has been construed here; and

the Commission's orders have regularly been upheld. If the Commission had intended to confer the broader authority claimed by appellant it could have authorized it to transport "such general merchandise as is dealt in by" drug stores, language which has been used in other cases. The Commission has not imposed a "Keystone" restriction since appellant may contract with any class of shippers so long as the commodities are intended to be used as stock in trade of drug stores.

III

There is no merit in the contention that the Commission's cease and desist order is not supported by adequate findings and substantial evidence, and that its action was arbitrary and capricious.

The evidence of record shows that appellant transported 51 shipments to consignees other than drug stores (Comm. Exhibit No. 2, R. 221–226, 54–57). Under those circumstances, the burden rested upon the appellant to prove that the shipments, although not moving to a drug store, were eventually intended for delivery to a drug store, in order to meet the Commission's "intended use" test. *Dart Transit Co.* v. *Interstate Commerce Commission,* 110 F. Supp. 876, 880 (D. Minn.), affirmed, 345 U. S. 980. The appellant did not meet that burden of proof.

The Commission thereupon found, after properly interpreting the permit, that the appellant, in transporting those shipments, had exceeded the scope of its authority. The issue presented did not warrant nor require extensive findings. We submit that the Commission's report, when read as a whole, contains all

findings necessary and complies fully with the decisions of the courts and the provisions of the Administrative Procedure Act.

IV

If, as appellant contends, the permit is less broad than the "grandfather" operations upon which it is based, its remedy, which it has not followed, is to petition the Commission to reopen the "grandfather" application and allow the introduction of additional evidence in that proceeding. The 1942 permit is at least as broad as that justified by Nelson's representations made at that time. Appellant contends that in fact Nelson was not merely hauling for the Walgreen company but was also transporting a wide selection of commodities including brick, flagstone, steel bodies and plumbing and heating supplies. In no way can the phrase "stock in trade of drug stores" be stretched by construction to provide appellant with the permit he claims. His collateral attack upon the permit cannot be permitted in a proceeding to enforce his compliance with the permit that was issued.

In recent years, despite the lapse of time, the Commission has, where adequate grounds are shown, been willing to entertain petitions to reopen original "grandfather" permit and certificate proceedings, take additional evidence, and broaden the scope of the "grandfather" permit or certificate. Whether appellant would be successful in such a proceeding cannot be known, but, if appellant has a legitimate grievance, that is where its remedy lies.

ARGUMENT

I

THE SOLE QUESTION IN THIS PROCEEDING IS THE CORRECT CONSTRUCTION OF THE PERMIT THAT WAS ISSUED

This is a proceeding to require appellant to limit his motor carrier operations to those covered by its permit. Under its permit, appellant is allowed to transport "stock in trade of drug stores". He has been ordered to cease and desist transporting such items as automobile batteries for department stores and dried glue for manufacturers of gummed products. Appellant is here contending that the only reasonable construction of the permit which authorizes it to transport "stock in trade of drug stores" is one which will allow it to transport dried glue and automobile batteries for businesses which are concededly not drug stores. Before turning to the reasonableness of the Commission's construction of the permit which the Commission issued (Point II, *infra*, p. 18), we must emphasize that the only issue here is one of the correct construction of the permit first issued in 1942. The Commission has taken no action which alters or revokes any rights which appellant has ever had.

A. DETERMINING THE CORRECT CONSTRUCTION OF APPELLANT'S PERMIT DOES NOT CONSTITUTE A MODIFICATION OR REVOCATION OF THE PERMIT

The proceeding under review was instituted under the provisions of Section 204 (c) of the Interstate Commerce Act (49 U. S. C. 304 (c)) to determine whether or not the appellant had engaged in motor

carrier operations beyond the scope of its permit. In order to make such determination it was necessary for the Commission to interpret the appellant's permit.

It is well settled that the construction of the scope of permits and certificates issued by the Commission is within its province and should not be overturned unless clearly erroneous.[3]

In *Dart Transit Co.* v. *Interstate Commerce Commission,* 110 F. Supp. 876, 880 (D. Minn.) affirmed, 345 U. S. 980, the district court stated:

> In *Noble* v. *United States,* 319 U. S. 88, 93, * * * the Supreme Court said that "The precise delineation of an enterprise which seeks the protection of the 'grandfather' clause has been reserved for the Commission." By the same token we think that within reasonable limits it is for the Commission to determine the scope of the "delineation."

To the same effect is *Malone Freight Lines, Inc.* v. *United States, et al.,* 107 F. Supp. 946, 949 (N. D. Ala.); affirmed, 344 U. S. 925, rehearing denied, 345 U. S. 914.

The fact is that the Commission in many cases has interpreted its permits and certificates, either in connection with the issuance of cease and desist orders,

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[3] *United Truck Lines* v. *Interstate Commerce Commission,* 189 F. 2d 816, 817 (C. A. 9), certiorari denied, 342 U. S. 830; *Adirondack Transit Lines* v. *United States,* 59 F. Supp. 503, 504 (S. D. N. Y.), affirmed, 324 U. S. 824; *Malone Freight Lines, Inc.* v. *United States, et al.,* 107 F. Supp. 946, 949 (N. D. Ala.), affirmed 344 U. S. 925; *Converse* v. *United States,* 109 F. Supp. 807, 808 (N. D. Cal.); *Dart Transit Co.* v. *Interstate Commerce Commission,* 110 F. Supp. 876, 880 (D. Minn.), affirmed, 345 U. S. 980; *Salvino* v. *United States,* 119 F. Supp. 277, 281 (W. D. Wash.)

as was done here, or upon petition of the holder of the permit or certificate or some carrier competitor. Likewise, in numerous instances, the courts, in arriving at their decisions, have found it necessary to make such interpretations. *Black* v. *Interstate Commerce Commission,* 167 F. 2d 825; *Southwest Freight Lines, Inc.* v. *Interstate Commerce Commission,* 184 F. 2d 149. There is nothing novel in the interpretation of the scope of permits and certificates.

In an extended discourse in its brief (pages 23 to 36) the appellant contends that the Commission's action in the present proceeding constituted an unlawful revocation or modification of the permit, contrary to the provisions of Section 212 (a) of the Act (49 U. S. C. 312 (a)). The Commission's action in no sense resulted in a deprivation or diminution of appellant's authority. This claim is invariably made by carriers when the Commission finds that they are conducting operations in excess of the scope of their authority. There, of course, is no basis for such contention, as was pointed out in *Willers* v. *United States,* 133 F. Supp. 270, 275 (D. S. D.), where the district court said, "The orders which plaintiff herein asks us to set aside take no rights from him, they merely interpret what rights he had from the beginning."

The Commission, in several decisions, has taken note of such claims, and emphasized that its interpretation of a permit or certificate is no more than a declaration of the carrier's authority, and is not a revocation or modification of that authority. *Greenberg—Investigation of Operations,* 52 M. C. C. 25, 28; *Dunn Extension—Radio Sets,* 54 M. C. C. 233, 236.

The appellant, in support of its argument in this regard, relies primarily upon the decisions in *Salvino* v. *United States,* 119 F. Supp. 277 (W. D. Wash.); *Bird Trucking Co., et al.* v. *United States,* 11 Fed. Carriers Cases 2115, and *United States* v. *Seatrain Lines,* 329 U. S. 424. All of these cases are clearly distinguishable from the case at bar.

In both the *Salvino* and the *Bird* cases, it was contended by the parties that the commodity descriptions in the respective certificates were ambiguous, and conflicting evidence was presented in support of the widely divergent views. Moreover, in the *Salvino* case, the court found that the Commission had rejected the issues as framed by the parties, and reframed them subsequent to the hearing without giving the parties an opportunity to meet the new issues, contrary to the decision of this Court in *Morgan* v. *United States,* 304 U. S. 1, 18.

In the *Seatrain* case, *supra,* the Commission reopened that water carrier's grandfather application dockets and canceled the prior certificate as having been inadvertently issued without certain conditions, and directed that a new certificate be issued containing the conditions which did not appear in the old certificate. The Commission's power to do so was denied by this Court. In the instant case, no such action was attempted by the Commission. It did not change appellant's permit in any particular, but merely interpreted the operating rights of the individual Nelson under his permit from its issuance in 1942. Clearly, the *Seatrain* decision is wholly inapplicable to the present action.

B. THE COMMISSION PROPERLY REFUSED TO CONSIDER EVIDENCE CONCERNING THE OPERATIONS OF APPELLANT'S PREDECESSOR PRIOR TO THE ISSUANCE OF THE "GRANDFATHER" PERMIT

Appellant now contends (Br. 36–43) that "The Commission erred in refusing to consider evidence of Nelson's 'grandfather' operations." But appellant previously requested that such evidence *not* be considered and, under the circumstances, it could have no bearing on the correct construction of the 1942 permit.

1. *Appellant objected to the consideration of any evidence as to the scope of the "grandfather" operations.* At the hearing in the proceeding under review there was offered in evidence by the counsel for the Bureau of Law of the Commission a certified copy of the proceeding before the Commission in Docket No. MC–1194 on the application of appellant's predecessor for a "grandfather" permit. Counsel for the appellant interposed the following objection thereto:

> Mr. BLANCHARD. I understand that with this last witness, the case of the Commission and the Interveners is now closed, and that side rests. At this time I would like to move to strike pages 1, 3 and 4 of Commission's Exhibit 1, on the ground that since the wording of the permit is not ambiguous or uncertain, that the Commission under the Seatrain case is without authority to consider events existing prior to the issuance of the permit and simultaneously with that, I move to dismiss the proceeding on the ground that no violation of the law has been shown as to any of the articles of transportation with which the record thus far concerns itself [R. 114].

* * * * * *

> * * * If some violation of law had been shown or some uncertainty or ambiguity had been shown, I would be the first to concede that we might go into these earlier matters, to find out and resolve the ambiguity, but my point is that no ambiguity having been shown, the Supreme Court decision in the Seatrain case and other decisions of the Federal court estops the Commission from going back and considering anything that happened back of the permit [R. 115–116].

In its report (R. 22) the Commission, in effect, sustained appellant's motion to strike the evidence referred to when it said:

> We agree with the contention of the parties and the examiner's conclusion that there is no such patent ambiguity in the permit as to warrant going back of it and giving consideration to events prior to its issuance. * * *.

It is submitted that the appellant should not now be heard to complain that the Commission refused to consider evidence antecedent to the "grandfather" grant, and it is precluded from contending in this action that the Commission erred in failing to consider such evidence. *United States* v. *L. A. Tucker Truck Lines*, 344 U. S. 33, 36–37; *General Transportation Co., et al.* v. *United States, et al.*, 65 F. Supp. 981, affirmed *per curiam*, 329 U. S. 668, rehearing denied, 329 U. S. 827; *Transamerican Freight Lines, Inc.* v. *United States, et al.*, 51 F. Supp. 405; *United States* v. *Capital Transit Co.*, 338 U. S. 286, 291.

2. *Actual "grandfather" operations, unknown to the Commission, could have no bearing on the construction of the 1942 permit.* As pointed out above, the permit issued in 1942 was based upon statements submitted by appellant's predecessor. If the permit were ambiguous, it might be necessary to consider the application and the statements made to the Commission at that time. We discuss below, *infra*, pp. 18–22, the construction of the permit on its face and in the light of the application. But the operations of appellant's predecessor, unknown to the Commission at the time it issued the permit, could not possibly shed light on the meaning of the language used by the Commission in its permit.

The absurdity of appellant's position that the Commission should have considered evidence as to what was actually hauled by appellant's predecessor before 1935 is demonstrated by appellant's brief in this Court. Appellant's brief (pp. 48–49) summarizes commodities which Nelson now contends were hauled prior to 1935. Among these are electrical equipment, steel bodies, transmissions, slate, flagstone, plumbing and heating fixtures, and bricks. Appellant in effect argues that "stock in trade of drug stores" must be construed to cover these items since they were (it now says) hauled prior to 1935. Aside from the patent impossibility of construing "stock in trade of drug stores" to cover steel bodies and flagstone, there is no logic in seeking to do so. If appellant's predecessor actually transported such items prior to 1935, the Commission had no knowledge of it. In using the phrase "stock in trade of drug stores" it could not

have intended the permit to cover particular items about which it had no knowledge. What appellant's predecessor may actually have hauled, unknown to the Commission and not referred to in the documents filed in support of the application for a permit, could not shed any light on the intended scope of the permit. Since appellant asked the Commission not to consider such evidence, and since it has no bearing on the construction of the 1942 permit, the Commission correctly refused to consider evidence of Nelson's "grandfather" operations.

II

THE COMMISSION'S INTERPRETATION OF THE PHRASE "STOCK IN TRADE OF DRUG STORES" IS REASONABLE AND MUST BE SUSTAINED

A. GIVEN ITS PLAIN MEANING, "STOCK IN TRADE OF DRUG STORES" REFERS TO COMMODITIES WHICH ARE IN FACT THE STOCK OF AN ENTERPRISE WHICH IS A DRUG STORE

Once it is recognized that the sole issue is one of construing the permit issued in 1942, it is apparent that the Commission's position must be sustained. The Commission's determination in the instant case clearly was not arbitrary. The phrase would appear unambiguous. If "stock in trade of drug stores" is construed to mean what it says, appellant's permit authorizes it to transport those items which are in fact the stock in trade of a drug store. The commodities it transports must at some point be the stock in trade of a drug store.

Appellant argues that a permit to transport the stock in trade of a drug store is a permit to transport anything to anybody so long as an item similar to

that transported might be sold in a drug store. In this way appellant argues that his permit allows him to transport dry glue to a manufacturer of gummed products on the theory that some drug stores sell glue. We do not believe it is possible to construe "stock in trade of drug stores" as embracing industrial shipments of dry glue. But if such a construction is possible, it is certainly not necessary. Considering the permit on its face, the construction placed upon it by the Commission is reasonable. It must be sustained.

B. ANY AMBIGUITY IN THE PERMIT IS RESOLVED BY CONSIDERING IT IN THE LIGHT OF THE REPRESENTATIONS ON WHICH IT WAS BASED

In the proceeding before the Commission appellant took the position that the term "stock in trade of drug stores" as used in the appellant's permit, was not ambiguous. This is pointed out in the Examiner's report adopted by the Commission (R. 27):

> The sole issue herein is thus explicit and requires a determination of the extent of the authority granted by the commodity description "*stock* in trade of drug stores." None of the parties claim that such description is patently ambiguous, and ambiguity may not be assumed merely from the fact that the bureau and interveners are in disagreement with respondent as to the meaning of the description.

Only in those instances where a permit is patently ambiguous does the Commission refer to the record upon which it was issued in order to determine its meaning. This principle has been recognized by the

Commission in many of its decisions. For example, see *Asbury Park–New York Transit Corp.* v. *Bingler Vacation Tours, Inc.*, 9 Fed. Carriers Cases 451; *P. Saldutti & Sons, Inc., Interpretation of Permit*, 63 M. C. C. 593, 594.

For obviously sound reasons the Commission, in interpreting permits and certificates, is normally disinclined to consider evidence pertaining to the "grandfather" operations upon which they were based. To do so would create uncertainty among carriers and the public as to the scope of the authority, and would impede the Commission in its enforcement of the Act. Neither the holder of a "grandfather" permit or certificate nor a prospective purchaser, could be sure of the scope of the authority if it were subject to reexamination by the Commission at any time in the light of the facts which existed prior to the "grandfather" date.

But if there were thought to be any ambiguity, it would be settled by considering the permit in the light of the application and statements which appellant's predecessor in interest made in support of it. As we point out above, *supra*, pp. 17–18, actual operations of appellant's predecessor, unknown to the Commission, could shed no light on the scope of the authority which the Commission intended to convey by the language of the permit. To resolve any possible ambiguity in the permit the "legislative history" which should be examined is that upon which the permit was based. It may be assumed that the permit was not intended to be any broader than the maximum "grandfather" operations claimed by Nelson. What were the opera-

tions claimed by Nelson which, at the most, the permit could have been intended to cover?

The entire record in the "grandfather" application (docket No. MC–1194) was incorporated into the record in the investigation proceeding here under review and is included in the record before this Court. But there is no need to examine it in detail. Appellant agrees that the applications and the statements filed with it convey the impression that Nelson was doing no hauling of any kind except for a particular chain of drug stores:

> Nelson's answers to the various questions give the impression that, as of July 1, 1935, he had only one contract—with the Walgreen Company—* * *. [Br. 10]
>
> * * * * *
>
> * * * all of which confirm the impression that Nelson was hauling only for Walgreen. [Br. 11]
>
> * * * * *
>
> Like the application itself, the statement gives the impression that Nelson's only contract was to haul store fixtures, equipment and merchandise in connection with the opening, closing, or remodeling of Walgreen Drug Stores and to haul household goods for Walgreen's employees at Walgreen's expense. (D. C. Ex. 2; R. 38, 263–265.) This impression is confirmed by certain documents attached to the statement * * *. [Br. 11]

The application and supporting documents did *not* state that Nelson was engaged in the general hauling

of goods similar to those sold by drug stores. On the contrary, these documents clearly indicated, and appellant so agrees, that the stock in trade which Nelson was hauling was the stock in trade of a particular chain of drug stores. The commodities which he was hauling were ones which were intended to be used by drug stores as their stock in trade.

In the face of these facts it is inconceivable that the Commission, in issuing the 1942 permit, intended to authorize Nelson to engage in the general hauling of all goods similar to those dealt in by drug stores. Such a permit was not the one asked for by Nelson[*] and it certainly would not have been justified on the basis of the application and statements which Nelson submitted. Any doubt as to the correctness of the Commission's construction of the permit is thus removed by considering the permit in the light of the statements made to the Commission and upon which the Commission relied in issuing the permit.

C. THE COMMISSION'S CONSTRUCTION OF THE PERMIT, LIMITING APPELLANT TO THE HAULING OF GOODS INTENDED TO BE USED AS STOCK IN TRADE OF A DRUG STORE, IS CONSISTENT WITH PRIOR DECISIONS IN OTHER CASES.

In interpreting appellant's permit the Commission applied the "intended use" test. Since the beginning

[*] Appellant, in its brief, (p. 42) points out that the application form signed by Nelson in 1935 requested a permit to operate as a contract carrier of store fixtures, miscellaneous merchandise and household furniture. (R. 248). But the first question answered on that application form (R. 247) indicated that Nelson was *not* engaged in transporting "commodities generally", and that the miscellaneous merchandise which he transported were "special commodities" transported for the Walgreen Co.

of motor carrier regulation, the Commission, as one means of describing commodities in its permits and certificates, has identified those commodities "by reference to the intended future use." *C & H Transportation Co., Inc.—Interpretation of Certificate*, 62 M. C. C. 586, 587; *Crouch—Modification of Certificate*, 53 M. C. C. 436, 440; *P. B. Mutrie Mtr. Transportation Inc.* v. *Blue Line Express, Inc.*, 53 M. C. C. 530, 533–534; *Fleetlines, Inc.* v. *Osbourn Trucking Co.*, 54 M. C. C. 221, 230–231; *Dunn Extension-Radio Sets*, 54 M. C. C. 233, 235–236; and *Mural Trucking Service—Interpretation of Certificate*, 63 M. C. C. 47, 51.

In *C & H Transportation Co., Inc.—Interpretation of Certificate, supra*, the Commission pointed out that, in issuing permits and certificates, it identifies commodities to be transported in three principal ways: (1) by naming the commodities specifically, (2) by generic or class terms, and (3) by reference to their intended use.

The commodities which appellant is authorized to transport are simply identified in its permit in the manner set forth in (3) above, namely, by reference to their intended use. As stated by the Commission in its report in the instant proceeding, "The important determination here, as in all such inquiries, is what transportation was intended to be authorized by this language of the permit." (R. 23) Thus, in making such determination the Commission applied the "intended use", which was the basis upon which the permit was issued.

The application of this doctrine by the Commission has been sustained in three-judge district court proceedings.

In *Dart Transit Co.—Investigation of Operations*, 54 M. C. C. 429, an investigation proceeding was instituted to determine whether the carrier was transporting various commodities, beyond the scope of its permit to transport "packing house and dairy products, equipment, material and supplies," "dairy products, equipment, supplies, and material," and "canned goods and canning factory supplies." Some of the shipments involved (pp. 438 and 439) consisted of pulpboard cartons and paper garment hangers moving from a paper products manufacturer to dry-cleaning establishment suppliers, a flour manufacturer, a flour and home appliance manufacturer, a battery manufacturer, a brewer, and a paint manufacturer; cleanser from a cleanser manufacturer to consignees not engaged in the packing house, dairy products, or canning business; wooden boxes to a soft-drink manufacturer; and glass trays from a glass manufacturer to a bottling company. In issuing a cease and desist order with respect to these commodities, which was upheld by the district court and affirmed by this Court in *Dart Transit Co.* v. *Interstate Commerce Commission, supra,* Division 5 of the Commission said (p. 440) that in order for Dart to transport such commodities they "must at the time of shipment definitely be intended for use by a packing house, dairy-products concern, or cannery."

Similarly in *Converse* v. *United States*, 109 F. Supp. 807 (N. D. Cal.), the district court upheld a cease and

desist order entered by the Commission in *Pierce Auto Freight Lines, Inc.* v. *Converse*, 54 M. C. C. 447, in which the "intended use" test was applied. The certificate issued to Converse authorized it to transport, among other things, "machinery and machinery parts, mining and construction materials, equipment and supplies." The carrier transported paper bags, canned goods, and glue stock, which the Commission held to be beyond the scope of its authority, stating that in the absence of a showing upon the record that they were intended for use in connection with a mining or construction project, it must be concluded that they are not embraced in the authority set forth in the certificate.

If it had been the intention of the Commission, when it issued the permit in this case, to authorize the transportation of all articles similar to those which are stocked and sold in drug stores, without reference to the business use of the particular goods, the Commission could have described the commodities to be transported as "such general merchandise as is dealt in by" drug stores, as it has done in other proceedings. *Sanders Extension of Operations—Washington, D. C.*, 47 M. C. C. 210, 214; *J. P. Spaenhower, Modification of Certificate*, 9 Fed. Carriers Cases 247; *Anton Vidas—Contract Carrier Application*, 62 M. C. C. 106; and *Interstate Commerce Commission* v. *Ratner*, 6 Fed. Carriers Cases 2206.

The Commission, however, did not use this broad language in this instance, and therefore appellant is authorized under its permit, as issued, to transport only those commodities which are either consigned to a drug store or which are intended for eventual de-

livery to and sale in a drug store. None of the shipments involved meet that test.

In its brief (page 34) appellant reiterates the argument which it made before the Commission that it has undertaken to read into appellant's permit a "Keystone" restriction. The "Keystone" restriction to which the appellant refers is one which has been inserted in many permits since the Commission's decision in *Keystone Transportation Co. Contract Carrier Application,* 19 M. C. C. 475. The restriction specifies that the carrier to whom the permit is issued may enter into special and individual contracts or agreements with specified classes of shippers for the transportation of such goods as are dealt in by them. In its report in this case, however, the Commission disavowed any purpose to construe appellant's permit so as to limit the class or type of persons with whom it may contract to transport shipments (R. 239).

III

THE COMMISSION'S CEASE AND DESIST ORDER IS SUPPORTED BY ADEQUATE FINDINGS AND SUBSTANTIAL EVIDENCE

The appellant, on page 44 of its brief, states that "The Commission's report lacks findings and conclusions with respect to all material issues of fact and law, with reasons and bases therefor, as required by Section 8 (b) of the Administrative Procedure Act," and on page 46 states that the "cease and desist order is not supported by substantial evidence." On pages 45 and 46, appellant states that the order is arbitrary and capricious.

We submit that all of these contentions are wholly without foundation.

The Commission made all basic and ultimate findings required of it. The Commission painstakingly discussed each of the exceptions to the Examiner's report advanced by the appellant, and made a specific finding with respect to each.

The Commission then concluded its report with this finding (R. 240):

> We have given full consideration to respondent's exceptions and the replies thereto and find that except as modified herein the examiner has adequately stated the facts and conclusions on the issues in the report hereinafter set forth which accompanied his recommended order. With respect to that portion of the permit primarily an issue, namely, the phrase reading "*stock* in trade of drug stores", we agree with the conclusion of the examiner that to the extent respondent is transporting commodities which at the time of their movement are not, or are not intended to become, part of the stock in trade of a drug store, such operations are in excess of its authority and are in violation of section 209 of the act and should be discontinued. In the circumstances we adopt his report and findings as our own. An appropriate order requiring respondent to cease and desist from the operations found to be unauthorized will be entered.

The general principles applicable in determining the adequacy of the findings of the Commission and the sufficiency of the supporting evidence are well established. Thus, the requirements of the law are

met if the Commission's findings include the ultimate ones specified by the statute and provide a rational basis for its decision, and if the findings are in turn supported by substantial evidence in the record considered as a whole. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 531–532; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145–146; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 490.

In any event, the courts have held, following the enactment of the Administrative Procedure Act, that Section 14 (1) of the Interstate Commerce Act (49 U. S. C. 14 (1)), which is made applicable to Part II of that act relating to motor carriers by Section 204 (d) of that act (49 U. S. C. 304 (d)), does not require specific findings of fact to be made by the Commission except in cases where damages are awarded, which is not the case here. *Alabama G. S. R. Co.* v. *United States*, 340 U. S. 216, 227–228; *Coyle Lines, Inc.* v. *United States*, 115 F. Supp. 272, 276; *Luckenbach S. S. Co.* v. *United States*, 122 F. Supp. 824, 827, affirmed *per curiam*, 347 U. S. 984.

There is substantial evidence of record to support the foregoing findings. It was established by uncontradicted testimony and exhibits that during the period from July 31, 1953, to December 7, 1953, appellant transported in interstate commerce between points covered by plaintiff's permit a total of 51 shipments of commodities from certain consignors to certain consignees. None of the consignors or consignees was a drug store. The questioned shipments consisted of (1) canned or packaged grocery items,

such as canned dog food, canned hams, canned preserves and jellies, and salad dressing, consigned to grocery stores or warehouses; (2) fruit juices and dry and liquid cream to food manufacturers; (3) beer and wine to liquor distributors; (4) dry glue in bags to a manufacturer of gummed product; (5) candy to a wholesale candy distributor; (6) dry milk to a distributor thereof; and (7) automobile batteries to a general merchandise company (R. 221–226).

As the courts have repeatedly held, the function of weighing the evidence is for the Commission, and "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286–287; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 535.

Under these decisions, we submit that the evidence is substantial and affords a rational basis for the Commission's action, and that its order is neither arbitrary nor capricious.

IV

IF THE PERMIT, AS FAIRLY CONSTRUED, IS LESS BROAD THAN THE "GRANDFATHER" OPERATIONS, APPELLANT'S REMEDY IS TO PETITION TO REOPEN THE "GRANDFATHER" APPLICATION FOR THE INTRODUCTION OF ADDITIONAL EVIDENCE IN THAT PROCEEDING

Appellant, we submit, has been properly ordered to limit its motor carrier operations to those covered by its permit. In this proceeding, the scope of the existing permit has been reasonably construed and it has been established that appellant has recently en-

gaged in hauling operations beyond those authorized. The Commission's order in this proceeding must, we believe, be sustained.

It is clear from the record that the permit issued in 1942 is at least as broad as that justified by Nelson's representations. In fact it is broader. Nelson at that time stated that the only stock in trade which he hauled was for the Walgreen company. The permit, based on his statements, authorized Nelson to haul the stock in trade for any drug store. Appellant cannot successfully argue that the permit issued in 1942, as now construed by the Commission, is narrower than the stated operation upon which it was based.

In this proceeding appellant has sought to make a collateral attack on the permit. Appellant states that "Nelson did not know how to go about procuring a permit and was not represented by counsel * * *" (Br. 10). Appellant argues that he was misled by a Mr. Petritz, who has since died, and that his application was incorrect in many regards (Br. 10–13). It is stated that "Nelson was actually hauling a broader range of commodities, e. g., dime store merchandise, slate, flagstone, marble, plumbing and heating supplies and fixtures, electrical equipment, and automobile bodies and transmissions" (Br. 42).

At no time has appellant made any effort to change or correct the permit that was issued in 1942. Appellant may not sit by, violating the permit that was issued, and then seek to resist an order to comply with the permit by allegations that his "grandfather" operations were actually greater than those covered by the permit. Such a collateral attack upon the pro-

ceeding on the "grandfather" application cannot be made in the present action. Cf. *Callanan Road Co.* v. *United States*, 345 U. S. 507, 512–513; *Southwest Freight Lines* v. *Interstate Commerce Commission*, 184 F. 2d 149, 151; *Riss & Company* v. *United States*, 117 F. Supp. 296, 301, affirmed, 346 U. S. 890; *Interstate Commerce Commission* v. *Consolidated Freightways*, 41 F. Supp. 651, 655.

And in no way can appellant's permit, covering "stock in trade of drug stores", be construed to cover slate, automobile bodies, or other commodities which appellant now states that Nelson was hauling before 1935.

Appellant's real grievance, if it has one, is that the permit issued to its predecessor, fairly construed, does not correctly reflect the scope of the "grandfather" operations performed. Appellant also contends that Nelson was misled and has a legitimate excuse for having failed to describe correctly his pre-1935 operations in his application for a permit. Under these circumstances the proper remedy is a petition to the Commission to reopen the "grandfather" application and to take additional evidence in that proceeding. Despite the lapse of time the Commission has been willing, where adequate grounds are shown, to reopen original "grandfather" application proceedings to consider whether the permit adequately reflects the pre-1935 operations. *E. g., George Grifall Common Carrier Application*, 62 M. C. C. 763 (1954); *Howard Sober, Inc., Modification of Certificate*, Docket No. MC–8989 (1952), 61 M. C. C. 802; *Leichtman Bros., Inc., Modification of Certificate*, Docket No. MC–77064

(1954), 62 M. C. C. 810; *Old Colony Motor Lines, Inc., Modification of Certificate*, Docket No. MC-39099 (1952), 61 M. C. C. 803. In each of these cases the proceeding on the "grandfather" application was reopened, and after hearing the Commission in each instance broadened the scope of the "grandfather" certificate.

In suggesting appellant's proper remedy we do not, of course, pass on the correctness of the assertions as to the scope of Nelson's pre-1935 operations or on the alleged justification for having stated nothing about those operations either at the time of the application or during the succeeding years.

CONCLUSION

For the foregoing reasons the judgment of the district court should be affirmed.

Respectfully submitted.

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NOVEMBER 1957.

APPENDIX

STATUTES INVOLVED

Section 204 (c) of the Interstate Commerce Act, as added by the Act of August 9, 1935, 49 Stat. 543, 547, and amended by the Act of September 18, 1940, 54 Stat. 922 (49 U. S. C. 304 (c)) provides:

> Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaints.

Section 209 (a) (1) of the Interstate Commerce Act, as added by the Act of August 9, 1935, 49 Stat. 543, 552, and amended by the Act of June 29, 1938, 52 Stat. 1238, and by the Act of September 1, 1950, 64 Stat. 575 (49 U. S. C. 309 (a) (1)) provides in part:

> Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission,

authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: * * *.

Section 209 (b) of the Interstate Commerce Act, as added by the Act of August 9, 1935, 49 Stat. 543, 553, and amended by the Act of September 18, 1940, 54 Stat. 919 (49 U. S. C. 309 (b)) provides:

> Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204 (a) (2) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.

Section 212 (a) of the Interstate Commerce Act, as added by the Act of August 9, 1935, 49 Stat. 543, 555, and amended by the Act of June 23, 1938, 52 Stat. 1238, and by the Act of September 18, 1940, 54 Stat. 924 (49 U. S. C. 312 (a)) provides in part:

> Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however*, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: * * *.

Administrative Procedure Act (Act of June 11, 1946, c. 324, 60 Stat. 237):

> SEC. 8 [5 U. S. C. 1007]. In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * *

(b) SUBMITTALS AND DECISIONS.— * * * All decisions * * * shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record * * *.

SEC. 10 [5 U. S. C. 1009] * * *

* * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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